STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT ARBUCKLE, Personal Representative
of the Estate of CLIFTON M. ARBUCKLE,

Appellee,

v

GENERAL MOTORS, LLC,
SELF-INSURED,

Appellant.
_____/

Supreme Court No. 151277
Court of Appeals No. 310611

MCAC LC #11-000043

BWDC Order #031411019

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APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF ISSUES

I. Do the Michigan Courts, Workers' Compensation Agency and Workers' Compensation Board of Magistrates have jurisdiction to adjudicate Michigan Workers' Compensation benefit disputes according to Michigan that is not pre-empted by federal law when an employer seeks to reduce an injured employee's workers' compensation benefits because of that employee's receipt of Social Security Disability or disability pension benefits.

The Director of the WC Agency answered, "Yes" with respect to SS Disability.

The Magistrate answered, "Yes."

The MCAC did not directly answer, but still asserted jurisdiction.

The Court of Appeals answered, "Yes."

Appellee Arbuckle answers, "Yes."

Appellant GM answers, "No."

II. In deciding whether the Defendant-Appellant met its burden of proof to establish a right to coordinate disability pension benefits, should the Michigan Workers' Compensation Agency and Michigan Courts apply and construe state law in a manner consistent with U.S. Supreme Court precedent that constitutes binding interstitial federal labor law?

The Director of the Workers' Compensation Agency did not reach the issue.

The Magistrate answered, "Yes."

The MCAC answered, "No."

The Court of Appeals answered, "Yes."

The Appellee Arbuckle answers, "Yes."

The Appellant GM answers, "No."

STATEMENT OF STANDARD OF REVIEW

Questions of law raised in Appellant's Application are subject to *de novo* review. *DiBenedetto v West Shore Hosp*. 461 Mich 394, 401-402; 605 NW2d 300 (2000); MCL 481.861a(14).

ARGUMENT

I. The Michigan Courts, Workers' Compensation Agency and Workers' Compensation Board of Magistrates have jurisdiction to adjudicate Michigan Workers' Compensation benefit disputes according to Michigan law and that jurisdiction is not pre-empted by federal law when an employer seeks to reduce an injured employee's workers' compensation benefits because of that employee's receipt of Social Security Disability or disability pension benefits.

Appellant General Motors has argued on appeal that Appellee Arbuckle's efforts to enforce the Magistrate's Order to pay worker's compensation benefits is pre-empted by the Labor Management Relations Act (the Taft-Hartley Act). Arbuckle made a Request for a Rule 5 enforcement Hearing before the Director of the Workers' Compensation Agency to demand compliance with a Magistrate's previous order to pay benefits. GM claimed it no longer had to pay benefits pursuant to the Magistrate's Order because of purported amendments to the collective bargaining agreement and pension plan under which Arbuckle retired. For two basic reasons, Arbuckle has argued in response that GM has failed to meet its burden of proof to establish a right to coordinate of benefits.[1]

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[1] GM as Employer has the burden to establish a right to coordinate workers' compensation benefits by specific other benefits. MCL 418.354(10) provides that an Employer must provide "satisfactory proof of the basis for...a reduction" to the Workers' Compensation Agency. *Brown v Beckwith Evans Co*, 192 Mich App 158; 480 NW2d 311 (1991), *Scheuneman v GMC*, 1999 Mich App LEXIS 1787; *rev on other grounds*, 461 Mich 907, 603 NW2d 784 (1999), *Black v Michigan Bell Telephone Co,* 128 Mich App 606, 608; 341 NW2d 157 (1983), *Maner v Ford Motor Co*, 196 Mich App 470, 485-486, 488-489; 493 NW2d 909 (1992), aff'd 442 Mich 620; 502 NW2d 197 (1993).

First, Arbuckle has argued in response that GM failed to meet its burden of proof because GM illegally "considered" Arbuckle's receipt of Social Security Disability Benefits in its decision to reduce Arbuckle's workers' compensation benefits. This "consideration" violates the text of MCL 418.354(11) which bars consideration of Social Security Disability benefits in the coordination and calculation of workers' compensation benefits. GM puts forward no argument as to why Michigan's subject matter jurisdiction over this issue is pre-empted by federal law. (Nor was this issue considered subject to federal pre-emption in *Garbinski v GM LLC*, 2012 US Dist LEXIS 45129; 521 Fed Appx 549 (2013) The resolution of this issue depends upon a straightforward reading and application of MCL 418.354(11), and a resolution of this issue by state officials does not in any way come close to even raising federal pre-emption questions.

Second, Arbuckle has argued in response that GM failed to meet its burden of proof of establishing a right to coordinate and reduce his workers' compensation beacause the UAW had no legal authority to represent him, as a retiree, in any attempted modification of his collectively bargained pension under which he retired. Arbuckle has argued that GM failed to meet its burden of proof that it is entitled to coordinate and reduce his workers' compensation benefits because of the receipt of disability pension benefits. Instead of meeting its burden of proof to establish coordination, GM has argued that Arbuckle's

efforts in Michigan proceedings to enforce the Magistrate's Order to pay benefits are pre-empted by federal law.

The "canonical" exposition of federal pre-emption doctrine is contained in *Rice v Santa Fe Elevator*, 331 US 218; 67 S Ct 1146; 91 L Ed 1447 (1947). Richard Epstein and Michael S. Greve, *Federal Pre-Emption: State Powers, National Interests,* (eds Epstein and Greve, AEI, 2007), p16. The U.S. Supreme Court stated therein:

> "We start with the assumption that the historic police powers of the States were not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute."

GM claims in its Application for Leave that the "Court of Appeals erred when it improperly exercised subject matter jurisdiction over a purely federal question." (Statement of Issues, Appellant's Application at x.) GM maintains that the "Court of Appeals committed reversible error when it disregarded established federal law and perfunctorily ruled that it had subject matter jurisdiction." (Application for Leave at 11) GM relies on 29 USC 185(a) which provides:

> "suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The text of this federal statute says nothing on its face about restricting or limiting state subject matter jurisdiction. In leading U.S. Supreme Court cases not cited by GM , the Court held that "The basic purpose of 29 USC 185(a) is not to limit, but to expand, availability of forums for enforcement of contracts made by labor organizations, and the purpose of conferring jurisdiction upon federal courts as not to displace, but to supplement, the thoroughly considered jurisdiction of courts over contracts made by labor organizations." *Charles Dowd Box Co. v Courtney,* 368 US 502; 82 S Ct 519; 7 L Ed 2d 483 (1962) The Court reiterated the point in *Boys Market, Inc. v Retail Clerks Union*, 398 US 235; 90 S Ct 1583; 26 L Ed 2d 199 (1970), when it stated "the grant of Federal District Court jurisdiction over suits for violation of collective bargaining agreements (29 USC 185(a)) is to supplement, and not encroach upon, the pre-existing jurisdiction of the state courts. Assuming for the moment, as GM argues, that this workers' compensation case is really a breach of a labor contract in disguise--which it is not--that in and of itself would not mean that the Michigan Courts and Michigan Workers' Compensation Agency lack jurisdiction to adjudicate the matter. *Charles Dowd* and *Boys Market* make that clear. The Amicus Brief

filed by the Michigan Manufacturers Association tellingly states it"does not take a position regarding the scope of §301 complete preemption as it relates to the instant matter, and does not take a position as to whether jurisdiction exists in state court." (Amicus Brief at 9, footnote 3) GM's argument that Michigan Workers' Compensation officials and the Michigan Courts do not have jurisdiction over this Michigan workers' compensation case is clearly untenable.

Notwithstanding the text of § 301 that does not specifically or expressly provide for federal pre-emption of state subject matter jurisdiction, there is a body of doctrine that has developed explaining certain circumstances where claims under state law are pre-empted by the Taft-Hartley Act.

The Supreme Court has recognized that the Taft-Hartley Act "leaves much to the states, though Congress has refrained from telling us how much." *Garner v Teamsters Union*, 346 US 485; 74 S Ct 161; 98 L Ed 228 (1953) "Certain state causes of action...are not displaced simply because there may be an argumentative coincidence in the facts adducible in the... action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote."

International Ass'n of Machinists v Gonzales, 356 US 617; 78 S Ct 923; 2 L Ed 2d 1018 (1958)

While *Allis-Chambers Corp v Lueck*, 471 US 202, 208-212; 105 S Ct 1904; 85 L Ed 206 (1985) is a leading case in the area of §301 federal pre-emption, that does not mean it applies here to dictate a result contrary to the Court of Appeals, especially in light of the well-pleaded complaint doctrine articulated in *Caterpillar, Inc v Williams*, 482 US 386, 398-399; 107 S Ct 2425; 96 L Ed 2d 318 (1987).

The U.S. Supreme Court in *Allis-Chambers* stated:

> "Congress....has never exercised authority to occupy the entire field in the area of labor legislation ['We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.' *Motor Coach Employees v Lockridge*, 403 US 274, 289; 91 S Ct 1909; 29 L Ed 2d 473 (1971)] .Thus the question whether a certain state action is pre-empted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone.'" *Malone v White Motor Corp*., 435 US 497, 504; 98 S Ct 1185; 55 L Ed 2d 443 (1978), quoting *Retail Clerks v Schermerhorn*, 375 US 96, 103; 84 S Ct 219; 11 L Ed 2d 179 (1963). Congress did not state explicitly whether and to what extent it intended §301 of the LMRA to pre-empt state law. In such instances courts sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."

The U.S. Supreme Court indicated in *Allis-Chambers* that state suits alleging contract violations are pre-empted and must be brought under Section 301 of the LMRA--but Arbuckle has not brought a state suit alleging breach of contract. He has instead sought

GM's compliance with a workers' compensation Order. The Court in *Allis-Chambers* went on to observe that:

> "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."
>
> ....
>
> "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis. We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim... or dismissed as pre-empted."

The U.S. Supreme Court revisited the scope of §301 federal pre-emption in *Lingle v Norge Div. of Magic Chef,* 486 US 399; 108 S Ct 1877, 100 L Ed 2d 410 (1988). The Court noted that "State-law analysis might well involve attention to the same factual considerations...but we disagree such parallelism renders the state-law analysis dependent

upon the contractual analysis, " and is thereby pre-empted.

Also of note, is Footnote 9 in *Lingle*: "We note that under Illinois law, **the parties to a collective-bargaining agreement may not.... alter a worker's rights under the state worker's compensation scheme....Before deciding whether such a state-law bar to waiver could be pre-empted under federal law by the parties to a collective-bargaining agreement, we would require "clear and unmistakable" evidence, see *Metropolitan Edison Co v NLRB*, 460 US 693, 708, 75 L Ed 2d 387, 103 S Ct 1467 (1983), in order to conclude that such a waiver had been intended.** No such evidence is available in this case." (Emphasis added.)

This footnote in *Lingle* has significant relevance to the issues at hand. The U.S. Supreme Court unequivocally states here that for a worker to waive his statutory worker's compensation rights through the collective bargaining process, there must be "clear and unmistakable" evidence the waiver was intended. For GM to meet its burden of proof to establish a right to coordination by claiming that an amended collective bargained amendment waived any of Arbuckle's workers' compensation benefits, GM was required to submit "clear and unmistakable" evidence of such a waiver. No evidence of such a waiver, let alone that which is clear and unmistakable, was offered by GM.

While GM cites *Allis-Chambers* for the proposition that Arbuckle's workers' compensation case is really a breach of labor contract case in disguise and is thereby pre-empted, the Supreme Court has made it clear in determining whether there is pre-emption, courts cannot redraft the pleadings so as to find or create federal pre-emption. Two years after the Court decided *Allis-Chambers*, the U.S. Supreme Court in *Caterpillar* held that the "presence of a federal question, even a §301 question in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule–that the Plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff, by eschewing claims based on federal law, choose to have the cause heard in state court." "[A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law....If a defendant could do so, the plaintiff would be master of nothing." See also *Alongi v Ford Motor Co*, 386 F3d 716, 725-726, 727-728 (CA 6, 2004) citing and quoting *Caterpillar,* "[D]efendants contend that § 301 should preempt Count IV because the defendants are certain to raise a defense that requires interpretation of a collective bargaining agreement. The Supreme Court has rejected this view." See also *Paluda v ThyssenKrupp Budd*, 303 Fed Appx 305 (CA 6, 2008) ; *Johnson v AGCO Corp*, 159 F3d 1114 (CA 8, 1998). Arbuckle in the instant case brought this case as a Workers' Compensation Director's Rule 5 hearing, insisting that GM honor Magistrate Lengauer's

Order to pay benefits that GM was ordered to pay. He demanded compliance with the Magistrate's Order. That GM attempted to meet its burden of proof to establish a right to coordination by making reference to purported amendments to a collective bargaining agreement does not resort in federal pre-emption pursuant to the *Caterpillar* doctrine.

GM has simply ignored the U.S. Supreme Court's actual holding in *Caterpillar*, which specifically recognizes that a plaintiff is the "master of his complaint" and that the assertion of a collective bargaining agreement in a defense argument does not thereby result in pre-emption. Arbuckle filed a Request for a Rule 5 hearing demanding compliance with Magistrate Lengauer's order to pay benefits. In that Demand for Compliance, Arbuckle did not "invoke a right created by a collective bargaining agreement" and "choose to plead" a federal claim, as GM claims. Instead, Arbuckle "demanded" in his Request for Compliance that benefits be "reinstated," and argued that "The Defendant has not met, and cannot meet, its burden of proof, that it can coordinate benefits under MCL 418.354." The Amicus Brief filed by the Michigan Self-Insurers Association essentially concedes that Arbuckle's pleadings make no such specific invocation of rights under the collective bargaining agreement. (MSIA Brief at 5)[2] Instead,

[2] The Michigan Self-Insurer's Association claims in its Amicus Brief that Arbuckle did not argue at the Rule 5 Hearing to compel compliance with Magistrate Lengauer's order that GM had failed to meet its burden of proof or specifically that it did not meet its burden

Arbuckle in his Rule 5 Request demanded compliance with Magistrate Lengauer's order and left GM to its burden of proof to establish a right to coordinate benefits. The Defendant must resort to mischaracterizing or recharacterizing Arbuckle's Request for a Compliance Hearing as a breach of contract action, and by ignoring the actual *Caterpillar* holding which recognizes where the purported amendments to the collectively bargained pension plan arise only in defense arguments to meet Defendant's burden of proof regarding coordination, there is no federal pre-emption.

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of proof because the union did not have authority to modify Arbuckle's contract and pension agreement. The record shows that this issue was presented and preserved at this hearing, although the Director of the Workers' Compensation Agency held for Arbuckle on other grounds. In its Memorandum with its Request for Hearing, Arbuckle stated that GM "has not met, and cannot meet, its burden of proof, that it can coordinate benefits under MCL 418.354." In responding to GM's proofs regarding the coordination of benefits, Arbuckle raised the issue that the union lacked authority to represent him relative to amendments of his collective bargaining agreement after he retired. (Rule 5 Hearing Transcript, 9/15/2010, p45-46) The Appellant then obtained a *de novo* hearing before the Magistrate where these issues were again raised and argued.

It is disingenuous for the writer of the Amicus Brief--**who wrote earlier briefs for GM**-- to argue that "is no wonder then defendant offered no proofs on" the issue. (Amicus Brief of Michigan Self-Insurers' Association at 5.) GM had ample opportunity to submit proofs to attempt to meet its burden of proof, and indeed did submit additional documents and testimony before the Magistrate.

The reason there were, as the Amicus Brief concedes, "no proofs" was because the union simply did not have authority to act on behalf of Mr. Arbuckle to modify and amend the contract and pension under which he retired as he was no longer under the law allowed to be a represented member of the bargaining unit.

It is also worth pointing out that if the *Caterpillar* doctrine did not exist–which it does--, the holdings in *Allis-Chambers* and *Lingle* would not otherwise require federal pre-emption of Arbuckle's workers' compensation case. The Supreme Court in *Allis-Chambers* demands first that we consider Congressional intent regarding possible federal pre-emption. The Defendant offers no proofs or advances no argument that Congress intended to pre-empt state workers' compensation laws with its passage of the Taft Hartley Act. The Supreme Court in *Allis-Chambers* acknowledges that "Congress....has never exercised authority to occupy the entire field in the area of labor legislation."We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Motor Coach Employees v Lockridge*, 403 US 274, 289 (1971) [3] "Federal pre-emption is not likely to be implied if there exists a 'historically entrenched state law remedy' and the federal statute has not expressly pre-empted it." *Merrill Lynch Pierce*

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[3] As Arbuckle pointed out previously, federal law does not, and never has, preempted state workers' compensation laws providing workers' compensation benefits. OSHA does not preempt workers' compensation claims. *Fuller v Skornicka* 79 F3d 685 (CA 7, 1996); *People v Pymm* 563 NE2d 1 (New York, 1990) *cert den* 498 US 1085 (1990); *People v Hegedus* 443 NW2d 127 (Mich. 1989). ERISA does not preempt workers' compensation claims for workers' compensation benefits, and specifically does not pre-empt MCL 418.354. *Scheuneman v GMC,* 243 Mich App 210; 622 NW2d 525 (2000); *Employer's Resource Management Co. Inc, v James*, 62 F3d 627, 634 (CA 4, 1995) (States retain authority in the workers' compensation context because ERISA does not preempt a benefit plan if "such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws." 29 USC 1003(b)(3)).

Fenner & Smith Inc. v Dabit, 547 US 71; 126 S Ct 1503; 64 L Ed 2d 179 (2006). In enacting 28 USC 1445 (C) to preclude removal of workers' compensation cases to federal court on account of diversity jurisdiction **or** federal question jurisdiction, Congress recognized that "Workmen's compensation cases arise and exist only by virtue of State laws. No federal question is involved in these cases...." *Colvin v Weyerhauser* Co, 229 F. Supp. 1022 (D Or. 1964) quoting 1958 U.S. Code Cong. & Admin. News, p.3106. "Congress has not enacted **any** law to give the federal government authority over state workers' compensation programs." *Siaperas v Montana State Compensation Ins Fund*, 480 F3d 1001, 1004 (CA 9, 2007) (emphasis added.) "The fair and efficient administration of Michigan's workers' compensation system is of such local concern" that it should not be pre-empted by federal labor law "absent a strong and compelling congressional mandate to preempt." *Hamlin v Michigan Seat Co*, 112 Mich App 84; 314 NW2d 804 (1981) citing *San Diego Building Trades Council v Garmon*, 359 US 236, 244; 79 S Ct 773; 3 L Ed 2d 775 (1959).

The Michigan Workers' Disability Compensation Act at MCL 418.841 provides that: "Any controversy concerning compensation shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau." Where it was argued that the Agency could not interpret agreements involving reimbursements to plans governed under federal ERISA law, this Court held that "By the very act of finding the

agreement to be within, or excluded from, the provisions of the act, the bureau is exercising subject matter jurisdiction, and rightly so. Section 841 grants the bureau broad authority to review "any controversy concerning compensation and all questions arising under this act". *Aetna Life Ins. Co. v Roose*, 413 Mich. 85; 318 NW2d 468 (1982) Compliance with a Magistrate's final order is clearly such a matter.

Resolution of this workers' compensation case is not actually "substantially dependent" upon an analysis of "the terms" of a collective bargaining agreement. As the Court of Appeals, following Magistrate Birch, recognized: "It is not disputed that under the 1990 CBA, coordination of workers' compensation benefits with disability retirement benefits was not allowed. Dickerson answered "Correct" when asked, "Okay, and you know that people that retired in 1990 on disability pension didn't see their Workers' Comp benefits get reduced by disability pension amounts if they retired under the 1990 contract, correct?" LaMarra answered "True" when asked, "employers [sic] that retire under different contracts have different entitlements based on when they retired, correct?" She further stated that "you retire under a pension plan contract based on your retirement date." The terms of the collective bargaining agreement and pension plan under which Arbuckle retired are not in dispute. Nowhere in any of the contractual agreements which established the pension plan did GM reserve the right to unilaterally amend or modify Arbuckle's

pension plan. The meaning of the terms of the 1990 collective bargaining agreement were clearly understood by Arbuckle, Dickerson, GM's third party benefit administrator and LaMarra, the manager of GM's disability plans, to bar coordination of workers' compensation benefits by disability pension benefits. Resolution of the workers' compensation case is therefore not "substantially dependent" upon an "analysis" of the "terms" of a collective bargaining agreement. GM's witnesses testify and stipulate to the meaning of the document. Because the meaning of the 1990 collective bargaining agreement under which Arbuckle retired which bars coordination is undisputed as the Court of Appeals recognizes, and does not require substantial interpreting or construing, the concerns raised in *Allis Chambers* and *Lingle* for the uniform interpretation and construction of the same collective bargaining agreements across jurisdictions do not come in to play. This particular language in the 1990 Letter Agreement only pertains to persons entitled to workers' compensation benefits under Michigan law, so again GM's concerns of the same document being interpreted in different ways across different jurisdictions again is unfounded.

The outcome here is not "substantially dependent" upon an analysis of the terms of a collective bargaining agreement. The outcome is instead determined by the fact that GM did not satisfactorily meet its burden of proof that an agent for Mr. Arbuckle amended

the agreement and pension plan under which he retired. Whether such an agent with authority did so does not require interpretation or construing of the collective bargaining agreement, nor is it substantially dependent upon such an analysis. Whether the union had authority to represent Mr. Arbuckle as a retiree is not determined by an interpretation of the collective bargaining agreement but instead by recognition of governing law that holds labor organizations have "representative status" for employees only--and not retirees. *Allied Chemical & Alkali Workers, Local Union No. 1 v Pittsburgh Plate & Glass Co*, 404 US 157; 92 S Ct 383; 30 L Ed 2d 341 (1971), hereinafter, *Pittsburgh Plate*.

GM argues that the Workers' Compensation Agency lacks jurisdiction to evaluate and to consider collectively bargained pension plans because they believe they necessarily require interpretation, and if they require interpretation, then federal pre-emption doctrine prohibits Agency consideration of the collectively bargained pension plan. If the Agency cannot consider these pension plans, then no Employer will ever be able to meet its burden to establish a right to coordination of disability pension benefits under MCL 418.354(14), or for that matter, even non-disability pension benefits under MCL 418.354(1)(d) and (e) where those benefits are collectively bargained.

In reality, it has consistently been held that Michigan statutes which incorporate existing federal statutes, rules, and regulations by reference are valid and constitutional. *People v De Silva*, 32 Mich App 707; 189 NW2d 362 (1971), *City of Pleasant Ridge v Governor*, 382 Mich 225; 169 NW2d 625 (1969) The Michigan Workers' Disability Compensation Act's coordination provisions that include references to ERISA governed pension plans, or pension plans collectively bargained pursuant to the NLRA are not thereby somehow pre-empted and unconstitutional.

Having said all that though, and most importantly, because Mr. Arbuckle did not bring a suit regarding a purported breach of a labor agreement or invoke the collective bargaining agreement in his pleadings--but instead filed a request for Compliance Hearing demanding that GM honor Magistrate Lengauer's order to pay workers' compensation benefits-- under *Caterpillar*'s rule recognizing that plaintiff is master of his complaint and the fact that the purported collective bargaining amendments arise in the context of GM's efforts to meet its burden of proof, there is no pre-emption. The Court of Appeals and this Court do not even reach the tests and formulations regarding pre-emption articulated in *Allis-Chambers*.

II. In deciding whether the Defendant-Appellant met its burden of proof to establish a right to coordinate disability pension benefits, the Michigan Workers' Compensation Agency and Michigan Courts should apply and construe state law in a manner consistent with U.S. Supreme Court precedent that constitutes binding interstitial federal labor law.

This Court has also asked the parties to brief the issue as to what federal or state law should be applied in deciding the case. What Michigan workers' compensation benefits an injured worker is entitled to receive, it should go without saying, requires attention and application of Michigan's Workers' Disability Compensation Act, MCL 418.101-941, and the Michigan caselaw interpreting that Michigan statute.

There may be some federal law that should be applied in the interpretation and application of Michigan's Workers' Disability Compensation Act because Article VI, Clause II of the U.S. Constitution provides "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; ...under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v Raich,* 545 US 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005)

The Michigan Manufacturers Association filed an Amicus Brief raising a claim that the Court of Appeals "failed to look to federal common law" as Section 301 of the LMRA "implicitly authorizes the development of a federal common law governing the interpretation of collective bargaining agreements" (Amicus Brief at 7, 9, citing *Textile Workers Union v Lincoln Mills*, 353 US 448, 451; 77 S Ct 912; 1 L Ed 2d 972 (1957) The MMA takes the position that state law is completely displaced by federal law where Arbuckle seeks to enforce his award of workers' compensation benefits. The Amicus Brief filed by the MMA attempts to raise an issue not preserved by GM, a practice not permitted. *Young v Wierenga*, 314 Mich 287, 299; 23 NW2d 92 (1946) As GM has noted, a "party abandons a claim when it fails to make a meaningful argument in support of its position." (GM's Application for Leave, footnote 10, citing *Berger v Berger*, 277 Mich App 700, 712 NW 2d 336 (2008) GM has instead taken the position that "state contract law" applies in the absence of federal pre-emption. (GM's Application for Leave to Appeal at 21.)

Nevertheless, we address the MMA's position that a federal common law should be applied in interpreting Michigan's workers' compensation act. It is first of all worth noting the Amicus Brief fails to cite a single workers' compensation case in any jurisdiction where such federal common law has been held to apply. Notwithstanding this, the MMA cites the U.S. Supreme Court's decision in *Lincoln Mills* that held that "the substantive law to apply

in suits under § 301 (a) is federal law." However, Arbuckle's workers' compensation case is not a "suit under §301" which might permit application of a federal common law.

Because Arbuckle's efforts to obtain compliance with the workers' compensation order was not a suit pled under §301 of the LMRA, *Lincoln Mills* and its progeny do not apply. Even if it did, because the meaning of the collective bargaining agreement was not disputed by the Defendant's own witnesses who agreed that the agreement and pension plan under which he retired barred the coordination of benefits, state law does not need to yield to a federal common law under *Lincoln Mills*. The 6th Circuit has furthermore recognize that "a retired person who is no longer a member of a bargaining unit may either sue at common law under established contract principles **or pursue a federal remedy** under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 for breach of contract. " *Hazen v Western Union Telegraph*, 518 F2d 766, 769-70 (6 CA, 1975) (emphasis added) Similarly, Mr. Arbuckle, as a retiree, is allowed to assert his rights to obtain compliance with the state workers' compensation order before the Workers' Compensation Agency, separate and apart from any right he had to bring a claim for breach of contract under §301 of the LMRA.

Although Michigan Courts and the Michigan workers' compensation tribunals should generally apply the Michigan Workers' Disability Compensation in adjudicating Michigan workers' compensation cases and should not apply a 'federal common law' in this case, because it is not a suit brought under §301 of the LMRA, Michigan Courts and its agencies are required in certain circumstances to recognize and follow certain binding U.S. Supreme Court precedent characterized as interstitial federal labor law that supplements state law.

"There is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards....State laws requiring that employers contribute to...workers' compensation funds...have withstood scrutiny....**Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it, only when it prevents the accomplishments of the purposes of the federal act**." *Metropolitan Life v Commonwealth of Massachusetts*, 471 US 724; 15 S Ct 2380; 85 L Ed 2d 728 (1985) (bold added)

In interpreting and applying the Michigan Workers' Disability Compensation Act in this case, one federal rule which must be followed is the holding in *Pittsburgh Plate* that recognizes unions do not have authority to represent retirees. The U.S. Supreme Court

interpreting the National Labor Relations Act has recognized that retirees are not members of the bargaining unit representing by unions. *Pittsburgh Plate* holds:

> "Nowhere in the history of the National Labor Relations Act is there evidence that retired workers are to be considered within the ambit of the collective bargaining obligations of the statute....Section 9(a) of the Labor Management Relations Act accords representative status **only** to the labor organizations selected or designated by the majority of employees...[P]ensioners are not employees within the meaning of the Act."

Michigan courts are bound to follow this decision of the United States Supreme Court construing a federal law on this point. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), citing *Chesapeake & O RY Co v Martin*, 283 US 209, 220–221; 51 S Ct 453; 75 L Ed 983 (1931) GM has argued that the Workers' Compensation officials and Michigan Courts are at liberty to ignore this ruling and conclude that the UAW was acting with authority as Mr. Arbuckle's representative when it attempted to amend the collective bargaining agreement and pension plan under which he retired.

Such a construction of the Michigan statute that the retired Mr. Arbuckle was a member of the bargaining unit represented by the union would conflict with the U.S. Supreme Court's *Pittsburgh Plate* decision and its construction of the National Labor Relations Act, and would therefore be unconstitutional. This Court has recognized that "we have a duty to interpret statutes and court rules as being constitutional whenever possible."

Dep't of Human Servs v Laird (In re Sanders), 495 Mich 394; 852 NW2d 524 (2014)"'[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.'" *Advisory Opinion*, 490 Mich 295, 307; 806 NW2d 683 (2011) If it is possible to reasonably construe statutes to avoid unconstitutionality, it is this Court's duty to do so. *Evans Prods Co v State Bd of Escheats*, 307 Mich 506, 548; 12 NW2d 448 (1943). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v California*, 155 US 648, 657; 15 S Ct 207; 39 L Ed 297 (1895)

The Michigan Workers' Compensation Agency should generally apply Michigan law in interpreting and applying the Michigan Workers' Disability Compensation Act to this Michigan workers' compensation case. The Michigan Workers' Compensation Agency and Michigan Courts should however apply *Pittsburgh Plate* as binding federal Supreme Court precedent as binding "interstitial" federal law for the proposition that retirees are not members of the bargaining unit represented by the union, and construe Michigan law consistent with that decision so as to not violate the Supremacy Clause of the United States Constitution.

Michigan Courts and the Michigan workers' compensation tribunals are also obliged to follow the interstitial federal labor law articulated in Footnote 9 to the U.S. Supreme Court's decision in *Lingle*. The U.S. Supreme Court recognized in that case that it would require 'clear and unmistakable' evidence that worker intended to waive his workers' compensation benefits through collective bargaining. As the Michigan Courts and Michigan workers' compensation apply Michigan law regarding GM's burden to establish a right to coordination of benefits, the U.S. Supreme Court's Footnote 9 in *Lingle* provides interstitial federal labor law supplementing state law that requires the Defendant to meet its burden with "clear and unmistakable evidence" that Arbuckle waived his right to uncoordinated benefits through some subsequent amendment or termination of his collectively bargained plan.[4]

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[4] One might argue that MCL 418.354(14) that provides for the possible coordination of disability pensions is itself vague, ambiguous or silent as to whether or not employer can unilaterally change a person's pension plan after he or she has retired so as to begin coordinating pension benefits by workers' compensation benefits. The Court of Appeals in *Murphy v City of Pontiac,* 221 Mich App 639, 561 NW 2d 882 (1997), decided on stipulated facts, did not resolve the question and the Court stated it found it therefore "unnecessary to resolve the separate question whether the [pension] plan should be considered "renewed" as the result of an employer's unilateral changes...." Michigan Courts must construe MCL 418.354(14) consistent with binding Supreme Court precedent in Footnote 9 to *Lingle* so as to require "clear and unmistakable evidence" that Arbuckle had waived his right to uncoordinated workers' compensation benefits. Beyond complying with the dictates of *Lingle*, if MCL 418.354(14) appears ambiguous to this Court, the law is clear that the Workers' Disability Compensation Act should be construed liberally. The Worker's Disability Compensation Act was designed to help relieve the social and economic difficulties faced by injured workers; as remedial legislation, it is liberally construed to

GM claims that, notwithstanding the U.S. Supreme Court's decision in *Pittsburgh Plate* that unions do not have authority to represent retirees as members of the bargaining unit, "it is well-settled as matter of law, that unions do have the power to bind their retirees with respect to non-vested benefits." It is true that some federal courts have made this assertion contrary to the Supreme Court's pronouncement in *Pittsburgh Plate*, while others have held otherwise. See e.g. "Any claims for benefits here belong to the retirees individually, and the retirees may deal directly with [the Employer] in pursuing such claims. *Rossetto v Pabst Brewing Co*, 128 F3d 538, 541 (CA 7, 1997); "The union could not agree on the [retirees] behalf." *Meza v General Battery Corp*, 908 F2d 1262, 1270 (CA 5, 1990) The Michigan Workers Compensation Agency and Michigan Courts are however bound to follow *Pittsburgh Plate* under the Supremacy Clause of the U. S. Constitution. A Michigan court is not obligated to follow a lower federal court decision construing a federal law, and certainly should not follow lower federal court decisions which conflicts with U.S. Supreme Court precedent. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), citing *Chesapeake & O RY Co v Martin*, 283 US 209, 220–221; 51 S Ct 453; 75 L Ed 983 (1931)

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grant rather than to deny benefits. *Bower v Whitehall Leather Co.*, 412 Mich 172, 312 NW2d 640 (1981). Liberal construction of the statute "is logically justifiable" "where the employer's responsibility is established." *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220; 669 NW2d 199 (2003)

As a matter of binding federal law, *Pittsburgh Plate* holds that retirees are not members of the bargaining unit represented by the employee's union. This Court is bound to follow the U. S. Supreme Court precedent *Pittsburgh Plate* on that point and construe Michigan law in a manner consistent with that U.S. Supreme Court precedent. Magistrate Burke correctly held that there was "insufficient evidence" that the UAW acted with authority to amend Mr. Arbuckle's collective bargaining agreement and pension plan after he retired. The Michigan Court of Appeals correctly applied state law, and the binding interstitial federal labor law of *Pittsburgh Plate* to determine whether anyone with authority had amended the contract. The Court of Appeals held "when defendant attempted to amend the terms of plaintiff's benefit structure, plaintiff, as a retiree, had no representation. Indeed, the record contains no evidence that plaintiff authorized the UAW to act as his representative to modify the 1990 agreement under which he retired....There is no indication that defendant entered into any new agreement with plaintiff. There were instead "attempted amendments."

While the collectively bargained pension plan under which Arbuckle retired includes language stating that benefits shall not be coordinated until "termination or earlier amendment," of the collectively bargained plan, as the Court of Appeals noted, the evidentiary record failed to include proof that anyone with authority to act on Arbuckle's

behalf to properly amend this collectively bargained pension plan. It is GM's assertion that the promises made in Arbuckle's collectively bargained pension simply expired on their own. "The CBA/pension plan expired," His expired CBA's of 1990," "The collectively bargained plan he relies on terminated," the CBA's expire" etc. (GM's Brief to MCAC, 12, 20; see also Appellant's Application for Leave to Appeal to the Supreme Court at 22) Elizabeth LaMarra, GM's manager of disability plans did not testify that the collectively bargained pension 'terminated' or 'expired;' she recognized that there is "only one pension plan" and it never terminated. (LaMarra Dep, p35) GM did not meet its burden of proof with citations to the actual evidentiary record that the promises of non-coordination of disability benefits automatically terminate every three years. To the contrary, the GM's own witness, benefit representative Aaron Dickerson, answered "Correct" when asked "You know that people that retired in 1990 on [a] disability pension didn't see their Workers' Comp benefits get reduced by disability pension amounts if they retired under the 1990 contract, correct?" GM's own witness, Elizabeth LaMarra, GM's Manager of Life Insurance and Disability Plans, answered "True" when asked whether employees "that retire under different contracts have different entitlements based upon when they retired, correct?" She further testified that "you retire under a pension plan contract based on your retirement date." (Cited by COA at 5) GM's own witnesses recognize that the rights and benefits retirees have are governed by the collectively bargained pension plan under which

they retired. (For another example consistent with this, pursuant to 1996 collective bargaining, injured GM workers retiring after September 1996 have their disability pensions converted to a coordinated regular pension at age 65. The promise of non-coordination of workers' compensation by disability pension benefits made to persons who had already retired under earlier contracts retired were not effected. Their rights remain governed by the contracts under which they retired. LaMarra Dep, 15-16)

GM claims the Court of Appeals held that "ordinary principles of contract interpretation, somehow do not apply here." (GM's Reply Brief at 1) The Court of Appeals made no such holding. Instead, the Court of Appeals followed, as it was required to do, the binding interstitial labor law that the union did not have authority to represent Arbuckle, and then applied basic principles of state contract and agency law regarding the amendment and modification of contracts. GM's proofs failed to meet its burden of proof that some agent with authority acted on Mr. Arbuckle's behalf to modify his collective bargaining agreement and pension plan under which he retired.

Under Michigan law "[a]n agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal. Bowstead on Agency (4th Ed.), p. 1. ...An agent is one who acts for or in the place of another by authority

from him; one who undertakes to transact some business or manage some affairs for another by authority " 2 C.J.S. p. 1025." *Stephenson v Golden*, 279 Mich 710; 276 NW 849 (1937) As a matter of binding interstitial federal labor law, the union had no authority to represent Mr. Arbuckle as an agent because he was a retiree. GM's purported amendment of the collective bargaining agreement was therefore a unilateral modification done without Mr. Arbuckle's consent. One party cannot unilaterally modify a contract because a unilateral modification lacks mutuality. In *Quality Prods & Concepts Co v Nagel Precision, Inc*. 469 Mich 362; 666 NW2d 251 (2003), this Court held that "[T]he principle of freedom to contract does not permit a party unilaterally to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract....This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence." Michigan law also recognizes that while no consideration for a modification of a contract is required, an agreement "changing, modifying or discharging such contract...shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge." MCL 566.1 GM offered Mr. Arbuckle no consideration to change his collectively bargained pension. He did not agree to any modification in writing. There is no evidence, and certainly no "clear and convincing evidence" that Mr. Arbuckle, through his conduct or his words, in anyway agreed to the

purported modifications of his collectively bargained pension. As the Court of Appeals held below, "It is simply not tenable that a contract could be amended with respect to a particular party when that party had no representation during the amendment process."

CONCLUSION

Clifton Arbuckle was injured in the course of his employment with the Appellant General Motors and was found disabled following a trial in 1995 before Magistrate Lengauer. GM was ordered to pay Arbuckle ongoing weekly workers' compensation benefits at a fixed rate of $362.78/week "until further order of the Bureau/[Agency.]" General Motors ceased paying benefits at that rate in 2010, leading Arbuckle to Request a Compliance Hearing before the Director of the Workers' Compensation Agency. General Motors, in attempting to meet its burden of proof that it was entitled to coordinate workers' compensation benefits by other benefits, claimed that Arbuckle's collectively bargained 1990 pension agreement was later amended and modified by GM and the UAW in 2009 so as to now permit disability pension benefits to be used to reduce workers' compensation benefits, in violation of the undisputed terms of contract and pension under which Arbuckle retired. The Court of Appeals recognized that while an amendment of a collective bargaining agreement allowing previously disallowed coordination of benefits would constitute renewal of a pension plan under MCL 418.354(14), citing *Murphy v*

Pontiac, 221 Mich App 643, 644, in this case, GM failed to prove that any valid amendment had occurred. The Court of Appeals, following Magistrate Birch, properly recognized that GM failed to meet its burden of proof in establishing a right to coordinate Arbuckle's disability pension benefits. The Court of Appeals properly recognized that the union did not have authority to represent Arbuckle as a retiree, consistent with *Pittsburgh Plate*. The Court of Appeals properly recognized that GM had failed to meet its burden of proof because it had failed to offer evidence that Arbuckle, or anyone acting with authority, had agreed to modifications or amendments to his collectively bargained pension agreement under which he retired so as to permit coordination of workers' compensation benefits by disability pension benefits.

GM's argument that federal law pre-empts Arbuckle's efforts to obtain compliance with Magistrate Lengauer's Order fails, first and foremost, because of the *Caterpillar* doctrine. Arbuckle did not, as the Defendant alleges, file an action under §301 of the LMRA "in disguise." Because the arguments asserting a purported amendment to the collectively bargained pension agreement arise in the context of GM's defense arguments to meet its burden of proof regarding coordination, there is no pre-emption pursuant to *Caterpillar*.

In determining what workers' compensation benefits Mr. Arbuckle is entitled to, the Michigan Workers' Compensation Agency and Michigan Courts should generally apply the Michigan Workers' Disability Compensation Act, the Michigan published precedent interpreting this statute, and as GM agrees, ordinary principles of state contract law where necessary. In addition, Michigan Courts must, under the Supremacy Clause of the U.S. Constitution, construe and apply this Michigan Workers' Disability Compensation Act so as to be consistent and constitutional with U.S. Supreme Court precedent containing binding interstitial federal labor law that supplements state law. The U.S. Supreme Court's *Pittsburgh Plate* case holding that retirees are not represented by their former unions is binding interstitial federal labor law. The U.S. Supreme Court's requirement in *Lingle* that a waiver of workers' compensation rights through the collective bargaining process be proven by clear and unmistakable evidence is also binding interstitial federal labor law. Arbuckle did not in fact file a suit under §301 of the LMRA which would then warrant application of a federal common law under *Lincoln Mills.*

The Court of Appeals correctly found that GM failed to meet its burden of proof to establish a right to coordinate disability pension benefits. Arbuckle also continues to maintain that GM failed to properly establish a right to coordinate benefits because of its unlawful consideration of Mr. Arbuckle's receipt of Social Security Disability benefits in

violation of MCL 418.354(11), which serves as an alternative basis to recognize that GM failed to meet its burden of proof relative to coordination.

RELIEF

WHEREFORE, for the reasons stated herein, and in Arbuckle's Brief in Opposition to the Application for Leave to Appeal, the Application for Leave to Appeal should be denied.

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